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EXAMINER
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* SANDRA LENZI, SIMKIE KAR,  
TASOULA A. MICHAELIDOU, JOAN E. HARVEY,  
MATTHEW ALLAN BEAM, DEMETRIUS TORINO MCCORMICK,  
SIMMAN WONG, JUNJIE GUAN, DEBORAH LEVENSON,  
JUAN PABLO CAMPOMANES-MARIN, NAVROZ BOGHANI, and  
PETROS GEBRESELASSIE

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Appeal 2015-007217  
Application 13/254,480  
Technology Center 1700

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Before CHUNG K. PAK, JEFFREY T. SMITH, and  
WESLEY B. DERRICK, *Administrative Patent Judges*.

PAK, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants<sup>1</sup> appeal under 35 U.S.C. § 134(a) from the Examiner's decision finally rejecting claims 39 through 47, 49 through 55, and 57.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Appellants identify the Real Party in Interest as INTERCONTINENTAL GREAT BRANDS LLC. (Appeal Brief filed March 2, 2015 ("App. Br."), 2.)

<sup>2</sup> Final Office Action entered July 28, 2014 ("Final Act."), 2.

## STATEMENT OF THE CASE

The subject matter on appeal is directed to a chewing gum composition comprising a gum base and at least first, second, and third flavor compositions. (Spec. ¶ 6.) The first flavor composition begins to release from the chewing gum composition when the chewing gum composition is masticated, the second flavor composition begins to release after the first flavor composition has begun to release, and the third flavor composition releases after the second flavor composition begins to release. (*Id.*) The first flavor composition may be an unencapsulated fruit flavor composition, the third flavor composition may comprise an encapsulated mint flavor, and the second flavor composition may comprise an encapsulated fruit flavor that is the same as the fruit flavor of the first flavor composition and an encapsulated mint flavor that is the same as the mint flavor of the third flavor composition. (Spec. ¶¶ 15–17.)

Details of the appealed subject matter are recited in representative claim 39, which is reproduced below from the Claims Appendix to the Appeal Brief:

39. A chewing gum composition, comprising a gum base and at least a first, second and third flavor composition wherein the at least one first flavor composition begins to release from the chewing gum composition when the chewing gum composition is masticated, the at least one second flavor composition begins to release after the at least one first flavor composition has begun to release, and the at least one third flavor composition releases after the second flavor composition begins to release; wherein the first flavor composition is an unencapsulated fruit flavor composition and is present in an amount from about 0.05% to about 1.0% by weight based on the weight of the chewing gum composition;

wherein the at least one second flavor composition comprises two encapsulated flavors and is present in an amount from about 1.0% to about 5.0% by weight based on the weight of the chewing gum composition, wherein one of the two flavors is the same fruit flavor of the first flavor composition and the second of the two flavors is the same mint flavor of the third flavor composition; and

wherein the at least one third flavor composition comprises an encapsulated mint flavor and is present in an amount from about 1.0% to about 4.0% by weight based on the weight of the chewing gum composition.

(App. Br. 15, Claims Appendix.)

Appellants seek review of the following grounds of rejection maintained by the Examiner in the Answer entered on May 21, 2015 (“Ans.”):

Claims 39–47, 49, 50, 52, and 57 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of U.S. Patent 3,795,744, issued in the name of Ogawa et al. on March 5, 1974 (hereinafter referred to as “Ogawa”);

Claim 51 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Ogawa in view of U.S. Patent 3,867,556, issued in the name of Darragh et al. on February 18, 1975 (hereinafter referred to as “Darragh”);

Claims 53 and 54 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Ogawa in view of U.S. Patent 6,627,233 B1, issued in the name of Wolf et al. on September 30, 2003 (hereinafter referred to as “Wolf”);

Claim 55 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Ogawa in view of Wolf and U.S. Patent 5,912,030, issued in the name of Huzinec et al. on June 15, 1999 (hereinafter referred to as “Huzinec”); and

Claims 39–47, 49–55, and 57 provisionally rejected on the ground of nonstatutory, obviousness-type double patenting over claims 1–29 of copending U.S. patent application 13/821,296 (hereinafter referred to as the ‘296 application”).

## DISCUSSION

Upon consideration of the evidence on this appeal record and each of Appellants’ contentions, we sustain the Examiner’s rejections of claims 39–47, 49–55, and 57 under 35 U.S.C. § 103(a) for obviousness and claims 39–47, 49–55, and 57 for obviousness-type double patenting for the reasons set forth in the Final Action and the Answer. We add the discussion below primarily for emphasis and completeness.

### *Rejection of Claims 39–47, 49, 50, 52, and 57 under 35 U.S.C. § 103(a)*<sup>3</sup>

Appellants do not dispute the Examiner’s finding that Ogawa discloses a chewing gum composition comprising a gum base and at least first, second, and third flavor (seasoning) compositions, which are present in amounts falling within the ranges recited in claim 39. (*Compare* Final Act. 3, *with* App. Br. 4–9.) Appellants also do not dispute the Examiner’s

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<sup>3</sup> We limit our discussion to those claims separately argued, and claims not separately argued stand or fall with the argued claims. 37 C.F.R. § 41.37(c)(1)(iv). Appellants argue claims 39–47, 49, 50, 52, and 57 as a group. (*See generally* App. Br. 4–9.) Therefore, for the purposes of this appeal, we select claim 39 as representative, and decide the propriety of the rejection of claims 39–47, 49, 50, 52, and 57 based on claim 39 alone.

finding that Ogawa discloses that the first, second, and third flavor (seasoning) compositions release sequentially from the chewing gum composition. (*Compare* Final Act. 3, *with* App. Br. 4–9.) Nor do Appellants dispute the Examiner’s finding that Ogawa discloses that fruit and mint are suitable flavors for inclusion in the flavor or seasoning compositions of the chewing gum composition. (*Compare* Final Act. 3, *with* App. Br. 4–9.) Appellants also do not dispute the Examiner’s finding that Ogawa exemplifies encapsulating some of the flavor (seasoning) compositions of a chewing gum composition to release the flavors sequentially from the chewing gum composition. (*Compare* Final Act. 3, *with* App. Br. 4–9.) The Examiner finds that Ogawa allows for a continuum of flavors to be provided in the chewing gum by encapsulating different flavors. (Final Act. 4.) Based on these findings, the Examiner concludes that it would have been obvious to utilize any combination of the flavors disclosed in Ogawa to provide the predictable result of a chewing gum that would release desired flavors singly or in combination in a desired order. (*Id.*)

Appellants argue that Ogawa does not recognize the problem of mint flavor interfering with fruit flavor solved by their invention. (App. Br. 7.) Appellants explain that the transitional second flavor composition of the chewing gum composition of claim 39, which is released between the first fruit flavor composition and the third mint flavor composition, is comprised of both the fruit flavor and the mint flavor and prevents the unwanted perception of the mint flavor overpowering the fruit flavor. (App. Br. 7.) Appellants argue that Ogawa does not teach or suggest using a transition flavor made up both encapsulated fruit and mint flavors to beneficially

prevent the mint flavor from interfering with the perception of the fruit flavor, and Appellants contend that the Examiner's rejection is therefore based on impermissible hindsight. (App. Br. 7–9.)

We begin our analysis by determining the meaning of claim 39, giving terms the broadest reasonable interpretation consistent with the Specification as it would be interpreted by one of ordinary skill in the art. *In re ICON Health and Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007) (During prosecution of patent applications, “the PTO must give claims their broadest reasonable construction consistent with the specification. . . . Therefore, we look to the specification to see if it provides a definition for claim terms, but otherwise apply a broad interpretation.”). Claim 39 recites a chewing gum composition in which a first flavor composition begins to release from the chewing gum composition when the chewing gum composition is masticated, a second flavor composition begins to release after the first flavor composition has begun to release, and a third flavor composition releases after the second flavor composition begins to release. The plain language of claim 39 reasonably indicates that the release of the first and second flavor compositions partially or substantially overlaps, as does the release of the second and third flavor compositions.

This interpretation is consistent with Appellants' Specification, which states that “the at least one second flavor composition begins to release when at least about 50% of the at least one first flavor composition has released from the chewing gum composition, including at least 60, 70, 75, 80, 90, 95, 97%, and all values and ranges there between,” indicating that the second flavor composition begins to release before all of the first flavor composition is released, thus providing partial or substantial overlap in release of the first

and second flavors. (Spec. ¶ 55.) Appellants' Specification also states that "the at least one third flavor composition begins to release when at least about 50% of the at least one [] second composition has released from the chewing gum composition, including at least 60, 70, 75, 80, 90, 95, 97%, and all values and ranges there between," similarly indicating that the third flavor composition begins to release before all of the second flavor composition is released, thus providing partial or substantial overlap in release of the second and third flavors. (Spec. ¶ 84.) Accordingly, under a broadest reasonable interpretation consistent with the Specification, claim 39 recites partial or substantial overlap in release of the first and second flavor compositions, and partial or substantial overlap in release of the second and third flavor compositions to impart both distinct individual flavors of the flavor ingredients and a combination flavor of such flavor ingredients.

Ogawa discloses that chewing gum having variable flavors was conventionally prepared in the art by mixing several different seasonings or flavoring agents into a chewing gum base. (Ogawa col. 1, ll. 29–34.) Ogawa explains that when such gum is chewed, the admixed flavors release simultaneously (a combination or blend flavor of the flavor ingredients), and the chewer does not taste individual, distinct flavors. (Ogawa col. 1, ll. 29–39.)<sup>4</sup>

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<sup>4</sup> In the event of further prosecution of the application, we direct the Examiner's attention to paragraph 57 of Appellants' Specification, which indicates that U.S. Patent 4,775,537 provides an example of a two component flavor composition for chewing gum. Column 5, lines 19–22 of this patent states that "[w]hen different flavoring agents are used and they have the same or substantially the same solubilities, then a flavor blend or combination may be perceived by the chewer," indicating that flavor blend

Ogawa further discloses that the chewing gum composition of his invention contains several different seasonings or flavoring agents in a conventionally available form, and in a form integrated, coated, and/or encapsulated with a high molecular weight compound, resulting in the release of the flavors over time while the gum is chewed. (Ogawa col. 1, ll. 45–53, 59–68.) Ogawa further discloses that suitable flavoring agents for the chewing gum composition include mints such as peppermint and spearmint; essential oils extracted from oranges, lemons and other fruits; bean derived flavors such as coffee and cocoa; wine flavors; and pungent materials such as affinin, pepper, and mustard. (Ogawa col. 2, ll. 54–59.) Ogawa exemplifies a chewing gum product containing unencapsulated pine oil, encapsulated lemon oil, and coated banana powder, and discloses that on chewing this product, the three different flavors could be enjoyed separately or successively during the chewing period. (Ogawa col. 4, ll. 9–22.)

Ogawa's broad disclosure of a chewing gum composition in which multiple flavors are released over time while the gum is chewed, inclusive of partial or substantial overlap in release of the first, second and third flavors, Ogawa's description of conventional chewing gum compositions in which multiple flavors are released simultaneously during chewing to provide blended flavors, and Ogawa's exemplification of chewing gum compositions in which multiple flavors are released successively during chewing to

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compositions for chewing gum were known in the art at the time of the invention. It also teaches, at column 5, ll.19–41 sequential releases of the flavoring agents, with the same or substantially same solubilities or different solubilities.

provide distinct flavors would have suggested a chewing gum composition in which multiple flavors are released successively in a partially, substantially and/or entirely overlapping manner to provide both distinct and/or blended flavors, or are released successively in a non-overlapping manner to provide distinct flavors. Therefore, it would have been obvious to one of ordinary skill in the art at the time of Appellants' invention, in view of Ogawa's disclosures, to prepare a chewing gum composition in which multiple flavoring agents are released in a partially, substantially and/or entirely overlapping manner to provide distinct and blended flavors such as mint and/or fruit flavors or seasonings by coating or encapsulating them.

As indicated *supra*, Ogawa's disclosures are not limited to the exemplified chewing gums, and Ogawa's broad disclosure of a chewing gum composition in which multiple flavors are released over time is not limited to release of particular flavors in a specific sequence. *Merck & Co. v. Biocraft Labs., Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989) (*quoting In re Lamberti*, 545 F.2d 747, 750 (CCPA 1976)) ("[T]he fact that a specific [embodiment] is taught to be preferred is not controlling, since all disclosures of the prior art, including unpreferred embodiments, must be considered."); *In re Fracalossi*, 681 F.2d 792, 794 n.1 (CCPA 1982) (A prior art reference's disclosure is not limited to its examples.); *In re Boe*, 355 F.2d 961, 965 (CCPA 1966) (All of the disclosures in a prior art reference "must be evaluated for what they fairly teach one of ordinary skill in the art."). As discussed above, Ogawa explicitly teaches simultaneous or sequential release of flavors from chewing gum to provide blended flavors or distinct flavors. Accordingly, Ogawa's disclosures as a whole, including Ogawa's teaching of a limited number of flavors suitable for use in chewing

gum compositions, would have suggested a chewing gum composition from which any combination of the disclosed flavors, such as fruit and mint, are released individually and/or together in any order, including a chewing gum composition in which mint and fruit flavors are released individually and/or together in a partially or substantially overlapping manner (as discussed above) to provide distinct and blended flavors, such as the release sequence of fruit, fruit and mint, and mint recited in claim 39. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (quoting *Sakraid v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976) (“[W]hen a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.”); *In re Kerkhoven*, 626 F.2d 846, 850 (CCPA 1980)(“It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition which is to be used for the very same purpose.”) Accordingly, the Examiner’s rejection is not based on impermissible hindsight as Appellants contend.

Appellants’ argument that Ogawa does not recognize the problem of mint flavor interfering with fruit flavor solved by their invention is without persuasive merit because “[i]n determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls.” *KSR*, 550 U.S. at 419; *see also In re Kemps*, 97 F.3d 1427, 1430 (Fed. Cir. 1996) (“Although the motivation to combine here differs from that of the applicant, the motivation in the prior art to combine the references does not have to be identical to that of the applicant to establish obviousness.”); *In re Beattie*, 974 F.2d 1309, 1312

(Fed. Cir. 1992) (“[T]he law does not require that the references be combined for the reasons contemplated by the inventor.”). As discussed above, Ogawa’s disclosures as a whole would have suggested to one of ordinary skill in the art the chewing gum composition of claim 39. As stated by the Supreme Court, “[t]he question is not whether the combination was obvious to the patentee [(i.e., applicants)] but whether the combination was obvious to a person with ordinary skill in the art.” *KSR*, 550 U.S. at 420.

Appellants also argue that Ogawa’s Examples teach away from a transitional second flavor composition comprising both fruit and mint flavors because Ogawa’s Examples describe separate release of the individual flavors in a chewing gum. (App. Br. 7–8.) However, Ogawa’s disclosures are not limited to its Examples, and as discussed above, Ogawa discloses that chewing gum in which various flavors are released simultaneously was conventional in the art at the time of Appellants’ invention. Although Ogawa exemplifies a sequential release alternative to a conventional simultaneous release, Ogawa nevertheless still would have suggested a chewing gum composition in which two or more flavors are released simultaneously and/or sequentially in a partially or substantially overlapping manner, as discussed above to provide both blend and distinct flavors. Ogawa thus does not teach away from a second flavor composition comprising both fruit and mint flavors. *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004) (“[t]he prior art’s mere disclosure of more than one alternative does not constitute a teaching away from any of these alternatives because such disclosure does not criticize, discredit, or otherwise discourage the solution claimed”); *In re Gurley*, 27 F.3d 551, 552–53 (Fed. Cir. 1994).

On this record, Appellants do not show that the claimed chewing gum composition produces results that would have been unexpected to one of ordinary skill in the art at the time of the invention. (*See generally* App. Br.) Nor do Appellants assert that the composition satisfied a long-felt need or was commercially successful. (*Id.*) Thus, on balance, the evidence of obviousness on this record outweighs Appellants' assertions in support of nonobviousness.

We accordingly sustain the Examiner's rejection of claims 39–47, 49, 50, 52, and 57 under 35 U.S.C. § 103(a).

*Rejections of Claims 51 and 53–55 under 35 U.S.C. § 103(a)*

Appellants rely in essence on contentions that the Examiner erred in rejecting the base claim, independent claim 39, from which claims 51 and 53–55 depend, and argue that the additional references cited in the rejections of these claims fail to remedy the deficiencies of Ogawa. (App. Br.9–14.) Because we are not persuaded of reversible error in the Examiner's rejection of claim 39, we sustain the rejections of claims 51 and 53–55 under U.S.C. § 103(a).

*Provisional Rejection of Claims 39–47, 49–55, and 57 for Obviousness-type Double Patenting*

Appellants do not contest the Examiner's provisional rejection of claims 39–47, 49–55, and 57 for non-statutory obviousness-type double patenting over claims 1–29 of the '296 application. (*See generally* App. Br.) Accordingly, we summarily sustain this rejection without comment. 37 C.F.R. § 41.37(c)(1)(iv); *see also* Manual of Patent Examining Procedure (MPEP) § 1205.02 (9th ed. Mar. 2014) ("If a ground of rejection stated by

the examiner is not addressed in the appellant's brief, appellant has waived any challenge to that ground of rejection and the Board may summarily sustain it, unless the examiner subsequently withdrew the rejection in the examiner's answer.").

#### ORDER

In view of the reasons set forth above and in the Final Action and the Answer, we affirm the Examiner's decision rejecting claims 39–47, 49–55, and 57 under § 103(a) and claims 39–47, 49–55, and 57 on the ground of obviousness-type double patenting.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED